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NO. 61779-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEE H. ROUSSO,

Appellant *pro se*

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

“The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. 1, § 8, cl.3, the “Commerce Clause.” Washington has chosen to ignore the Commerce Clause and has unlawfully asserted authority over all forms of internet gambling, a commercial activity that reaches across state and international borders. This Court should recognize that the State has overstepped the bounds of its authority and strike down RCW 9.46.240, as amended by SB 6613, the so-called “Internet Gambling Ban” or “Internet Poker Ban,” to the extent that the law makes it a crime (a felony!) to play poker on the internet.¹

In its Response, the State commits one colossal, overarching error that completely robs its brief of any analytical authority. Specifically, the State absolutely fails to recognize the *scope* of this legal challenge. From this gigantic error, of course, innumerable smaller errors follow.

“Gambling” is not a monolithic enterprise, but instead comes in many varieties. Congress has addressed some of these varieties, in particular interstate sports betting and interstate lottery sales, but has

¹ In previous briefing, Appellant has made it clear that this challenge does not extend to internet sports betting, lotteries sales, or intrastate internet gambling. For purposes of analytical clarity, Appellant will narrow the discussion to the issue of internet poker and does not seek a broader declaration. Appellant is also aware that the Rules of Appellate Procedure discourage the use of the “Appellant” label, but for a *pro se* litigant, referring to oneself in the third person is even more awkward than using the term “Appellant.”

remained silent (or has spoken with an ambiguity that is the legal equivalent of silence) with respect to other varieties of gambling, most notably poker. This challenge goes strictly to the latter, *i.e.*, those areas of gambling *where Congress has not spoken*. The State's response, on the other hand, focuses almost exclusively on the former. This is a fatal error.

The cause of the State's error is the fact that it simply does not understand (or understands, but refuses to acknowledge) the scope of Congressional enactments. Congress has never said that *all* interstate gambling violates the public interest. The effect of the State's error is that it engages in standard Commerce Clause analysis, which focuses on "conflicts" and "pre-emption," as opposed to *dormant* Commerce Clause analysis, which focuses on "discrimination" and "burdens on commerce." As a result, a large portion of the State's brief is simply a *non sequitur*, as it does not address the law *as challenged*. In other words, the State is barking up the wrong tree.

Beyond its profound analytical flaws, the State's brief is further tarnished by the State's willingness to engage in blatant acts of fabrication, in particular the State's completely odious assertion that the Washington was founded as a state with a complete ban on gambling.²

² Slightly less odious, but equally untrue, is the State's completely unfounded assertion that a violation of state law is a predicate offense under the Wire Act, 18 U.S.C. § 1084.

The challenged law burdens interstate and international commerce, and does so without the requisite unambiguous grant of authority from Congress.³ As a result, the law is *per se* unconstitutional,⁴ and this Court should strike it down.

II. REPLY

A. REPLY TO STATE'S INTRODUCTORY STATEMENT

In opening, the State claims that RCW 9.46.240 “specifically prohibits individuals *within the State of Washington* from knowingly using electronic means of communication, including the Internet, *to conduct gambling activities.*”⁵ However, Section 240 does not contain any geographical limitation.⁶ Moreover, Section 240 does not make it a crime to “conduct gambling activities.”⁷ Instead, Section 240 bars the knowing transmission or reception of gambling information, and only indirectly bans actual gambling.⁸

³ *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)(Congress must “manifest its unambiguous intent” before statute will be read to confer Commerce Clause authority to states.

⁴ *Granholm v. Heald*, 544 U.S. 460, 476 (2005)(State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity).

⁵ BR at 1, emphasis added.

⁶ RCW 9.46.240. The lack of a clear geographical limitation puts Section 240 in the same league as the law struck down in *American Libraries Ass’n v. Pataki*

⁷ RCW 9.46.240.

⁸ When adopted, Section 240 was clearly not intended to apply to gambling *per se*. It was adopted to prevent the transmission of point spreads (football), odds lines (baseball) and race results. As applied to internet poker, the statute does not cover the actual playing of the game. Instead, the “crime” that constitutes “professional gambling” is complete when the fee is paid to participate in the card game. RCW 9.46.0269(1)(b). The information

With respect to the second introductory paragraph, it is only half true that Congress and federal courts have recognized that gambling is an issue of local concern. While it is true that *intrastate* gambling has been recognized as an issue of local concern, it is equally true (and much more relevant for purposes of this lawsuit) that *interstate* gambling has long been recognized as an area that is exclusively of federal concern. Contrary to the State's assertion, Washington has *never* barred all gambling.

The fact that federal laws may “complement” state laws is a *non sequitur*, as the question raised is not whether Congress has pre-empted state action, but whether it affirmatively has authorized it. References to state police powers are also out of place, as there is no “police power” exception to the Commerce Clause.⁹

The State's assertion that the dormant Commerce Clause only applies where a uniform national scheme is necessary is incorrect, as the “uniform national scheme” test is only one part of the *Pike* analysis.¹⁰ Moreover, with respect to *interstate* gambling, Congress *has imposed a uniform national scheme*.

related to the payment of the fee is the “gambling information” that triggers a violation of RCW 9.46.240.

⁹ *Kansas City Southern Railway v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 79 (1914)(rejecting “the convenient apologetics of the police power” as a Commerce Clause defense.)

¹⁰ *State v. Heckel*, 143 Wash.2d 824, 837, 24 P.3d 404 (2001).

With respect to the third introductory paragraph, the question of whether a statute discriminates against out-of-state business interests is *not* part of the *Pike* balancing test. Instead, “discrimination” is a separate inquiry, conducted before reaching *Pike*, and where the discrimination is found, the Court does not even reach *Pike*.¹¹

B. REPLY TO STATE’S RESTATEMENT OF THE ISSUES

1. REPLY TO FIRST RESTATED ISSUE

Because this constitutional challenge rests on the dormant Commerce Clause, the question of “pre-emptive intent” on the part of Congress is not before the Court. Instead, the Court must determine whether Congress has explicitly and unambiguously authorized state regulation of internet gambling. It has not. Furthermore, the Wire Act *does not* predicate federal criminal liability on the violation of state gambling laws. With respect to the Unlawful Internet Gambling Enforcement Act (the “UIGEA”), 31 U.S.C. § 5361 *et seq.*, the act contains a “stand still” clause that specifically withholds any grant of authority to the states.¹² Still further, neither the Wire Act nor the UIGEA unambiguously applies to internet poker, which denies the State a grant of authority.

2. REPLY TO SECOND RESTATED ISSUE

¹¹ *Heckel*, 143 Wash.2d at 832.

¹² 31 U.S.C. § 5361(b).

In order to void statute under the dormant Commerce Clause, it is not required that the challenger show the necessity of uniform regulation, as the “uniform national scheme” test is merely part of the *Pike* balancing test.¹³ Moreover, where Congress has spoken, it has imposed a uniform national scheme on interstate gambling, most notably with respect to the Wire Act.

3. REPLY TO THIRD RESTATED ISSUE

The third restated issue comes reasonably close to capturing the issue before the Court, except that the “assuming for the sake of argument” language is completely gratuitous, as this lawsuit only implicates the dormant Commerce Clause.

4. REPLY TO FOURTH RESTATED ISSUE

This restated issue also comes close to capturing the issue before the Court. However, the State fails to give notice that the Court need not reach this issue (the *Pike* balancing test), and should not reach it, if it finds that Washington’s law is discriminatory.¹⁴

C. REPLY TO STATE’S RESTATEMENT OF THE CASE

- 1. WASHINGTON HAS NEVER HAD A COMPREHENSIVE BAN ON GAMBLING: ARTICLE II, SECTION 24 OF THE STATE CONSTITUTION ONLY APPLIES TO LOTTERIES. POKER IS NOT A LOTTERY.**

¹³ *Heckel*, 143 Wash.2d at 837.

¹⁴ *Heckel*, 143 Wash.2d at 832.

In a genuinely shocking display of argumentative dishonesty, the State asserts that *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 247 P.2d 787 (1952), stands for the proposition that “lottery” encompasses “all forms of gambling activities.”¹⁵ This is simply not true. Indeed, that *exactly the opposite* of what the Washington State Supreme Court held in *Evans*.¹⁶

The issue before the *Evans* court was whether *slot machines* fell under the Section 24 prohibition on lotteries.¹⁷ In reaching its conclusion that slot machines were prohibited, the Court adopted the holding of the Oregon State Supreme Court, which had considered the identical issue in *State v. Coats*, 158 Ore. 122, 74 P.2d 1102 (1938).¹⁸

"Of course, all forms of gambling involve prize, chance and consideration, *but not all forms of gambling are lotteries*. A lottery is a scheme or plan, as distinguished from a game where some substantial element of skill or judgment is involved. *Poker, when played for money, is a gambling game but, since it involves a substantial amount of skill and judgment, it cannot reasonably be*

¹⁵ BR at 4. The State is equally dishonest in its discussion of *Northwest Greyhound Kennel Ass'n v. State*, 8 Wn. App. 314, 506 P.2d 878 (1973), which was decided because there was no dispute over which the court could assert jurisdiction and because the plaintiff had failed to join an indispensable party. Given these defects in the action, the court had no basis for striking down the statute.

¹⁶ It is also worth noting that the *Evans* Court found the volume of slot machine gambling to be “astronomical,” which further belies any notion that this state has a history of eschewing gambling. *Evans*, 41 Wn.2d at 138.

¹⁷ *Id.* at 149-150.

¹⁸ *Id.* at 151.

contended that it is a lottery." (Italics ours)¹⁹

As the *Evans* dissenter, J. Grady, correctly observed, "After statehood, the legislature from time to time enacted legislation relating to various forms of gambling according as different schemes therefor were devised or invented. *The fundamental difference between a lottery and other forms of gambling was always recognized and dealt with separately.*"²⁰ Section 24 was enacted to control the Legislature, not the people.²¹ There has never been a general ban on gambling in Washington State.

2. THE LEGISLATURE HAS ACKNOWLEDGED THE RIGHT OF CITIZENS TO ENGAGE IN RECREATIONAL GAMBLING.

Not surprisingly, the State fails to cite the entire public policy articulated at RCW 9.46.010. While the Legislature condemned organized crime, it also recognized the need "to avoid restricting participation by individuals in activities and social pastimes, which activities and social pastimes are more for amusement rather than for profit, do not maliciously affect the public, and do not breach the peace."²² Internet poker players play primarily for amusement, their actions do not maliciously affect the

¹⁹ *Id.* at 150-51.

²⁰ *Id.* at 156. (emphasis added).

²¹ By historical accident, Washington was founded at the exact moment in time the nation was reeling from a number of lottery scandals, most notably the Louisiana Lottery Scandal. Seen in that light, it should be obvious that Section 24 was an anti-corruption measure, not an anti-gambling measure.

²² RCW 9.46.010.

public, and they do not breach the peace. Once again, the State is grossly overstating its abhorrence to gambling for the transparent purpose of protecting its monopoly.²³

D. REPLY TO STATE'S ARGUMENT.

1. REPLY TO SECTION IV.-B OF STATE'S BRIEF.

It is true that where Congress has *specifically authorized* state action, a Commerce Clause challenge must fail.²⁴ It is also true that where Congress has determined that a *specific type* of interstate commerce violates the public interest, the states can burden or discriminate against that particular form commerce at will.²⁵ However, while the State has correctly identified the controlling law, its argument fails because the requisite Congressional declarations simply do not exist.

In *Northeast Bancorp* the plaintiff banks challenged Massachusetts and Connecticut statutes allowing the acquisition of in-state bank holding companies by out-of-state bank holding companies located in nearby states, *i.e.*, New England.²⁶ The Supreme Court rejected the Commerce Clause challenge because Congress had passed specific legislation allowing states to enter into agreements allowing cross-border acquisitions

²³ A monopoly that the State has assigned to others, with the exception of the lottery.

²⁴ *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 174, 105 S. Ct. 2545, 86 L.Ed. 112 (1985).

²⁵ *Pic-A-State PA, Inc. v. Pennsylvania (Pic-A-State I)*, 42 F.3d 175, 179-80. (3rd Cir. 1984).

²⁶ *Northeast Bancorp*, 472 U.S. at 162.

of bank holding companies.²⁷ However, Congress has not *specifically* authorized the action taken by Washington in this case, so *Northeast Bancorp* does not support the State's position.

Pic-A-State I is even more instructive. In *Pic-A-State I*, the plaintiff corporation was selling Pennsylvania residents interests in lottery tickets that were purchased and physically held in other states.²⁸ The Pennsylvania State Legislature passed a law ("Act 8") banning the practice.²⁹ The United States District Court (M.D. Pa.) struck down the challenged provisions of Act 8 on dormant Commerce Clause grounds.³⁰ While *Pic-A-State* was pending appeal to the Third Circuit, Congress passed the 1994 Crime Control Act, which made it a crime to transmit information in interstate commerce for the purpose of procuring an interest in an out-of-state lottery.³¹ This Congressional action saved Act 8 from Commerce Clause oblivion.

The most important lesson to be learned from *Pic-A-State* is that *state laws regulating interstate gambling do in fact violate the Commerce Clause*. Specifically, the Third Circuit did not hold that the

²⁷ *Id.* at 174. "Here the commerce power is not dormant...Congress has authorized by latter amendment the Massachusetts and Connecticut statutes."

²⁸ *Pic-A-State I*, 42 F. 3d at 176-77.

²⁹ *Id.* at 177.

³⁰ *Id.*

³¹ *Id.* at 177-78, Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 320905, 108 Stat. 1796, 2126.

district court erred in finding a Commerce Clause violation and, indeed, assumed that the lower court was correct. Thus, if Congress had not acted, the district court ruling would have been affirmed.³² The question, then, is whether Congress has made a statement comparable to the 1994 Crime Control Act with respect to internet poker. It has not. Accordingly, with respect to internet poker, Washington is in exactly the same position Pennsylvania was in with respect to interstate lottery sales *prior* to the adoption of the 1994 Crime Control Act, *i.e.*, in violation of the Commerce Clause.

a. Congress has not banned internet poker.

What ties *Northeast Bancorp* and *Pic-A-State I* together is that in both cases Congress had provided a very specific and unambiguous authorization for the challenged state action. Congress has made no such authorization with respect to internet poker.

³² The State incorrectly argues that the Third Circuit reached its conclusion because the “federal act did not pre-empt Pennsylvania’s law.” BR at 15. Instead, the Third Circuit’s ruling was based on the fact that Act 8 fit hand-in-glove with the 1994 Crime Control Act. The State is even more incorrect when it states “Congress had spoken on the issue, thereby establishing that uniform regulation of interstate commerce relative to the sale of interests in lottery tickets was not of national concern.” *Id.* Congress has repeatedly said just the opposite: uniform regulation of interstate sales of lottery tickets *is* of national concern. It is illegal for a private party to sell lottery tickets across state lines, although the states themselves can enter into multi-state lottery programs.

Congress could, if it wished, simply ban all gambling in the United States. It has not done so. Congress could also ban all internet gambling in the United States but, once again, it has failed to do so.³³

b. Congress has not “expressly authorized” states to regulate interstate gambling.

The State contends that Congress has “expressly authorized” states to regulate internet gambling.³⁴ However, the State cannot identify any statute that provides the “express” authorization that allegedly exists. Instead, the statutes cited by the State are completely consistent with the Appellant’s theory of the case: the states regulate intrastate gambling and the federal government regulates interstate gambling.

c. The UIGEA does not grant the states authority to regulate internet gambling.

The State disingenuously claims that the UIGEA was passed “nearly contemporaneous” with SB 6613 in order to obscure (or attempt to obscure) the fact that the UIGEA was passed *after* SB 6613 and literally could not have been the source of any grant of authority to the State. Further, as of this writing, the UIGEA has not yet taken effect. The State’s reliance on the UIGEA is suspect for other reasons, as well. For example,

³³ For example, The Internet Gambling Prohibition Act of 1997 (the “IGPA”), S. 474, 105th Cong. 1st Sess. (1997), failed to pass the Senate in both 1997 and 1999. The same legislation then failed in the House *four* more times between 2000 and 2006, most recently as H.R. 4777, sponsored by Robert Goodlatte of Virginia.

³⁴ BR at 15.

the UIGEA specifically states that it does not “alter, limit or extend any Federal or State law” with respect to gambling.³⁵ Thus, while Congress disclaimed any pre-emptive intent with the UIGEA, it also withheld any grant of authority; any state law that was in violation of the Commerce Clause prior to the enactment of the UIGEA is still in violation of the Commerce Clause.

It is also unlikely, or, at a minimum, unclear that the UIGEA covers internet poker. The UIGEA restricts financial transactions for the benefit of persons “in the business of betting or wagering.”³⁶ “Bet or Wager” is defined in relevant part as “staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance...”³⁷ Poker is not a “contest of others,” as the players themselves are participants. Nor is poker a sporting event. Unfortunately (or fortunately, depending on one’s point of view), Congress gave no guidance whatsoever as to what constitutes a “game subject to chance.” Does the statute cover games where chance is merely a factor, or does coverage begin where the element of chance exceeds 51%? Congress did not say. Of course, Congress could have defined “game subject to chance” more precisely or, more to the point, Congress

³⁵ 31 U.S.C. § 5361(b).

³⁶ 31 U.S.C. § 5363.

³⁷ 31 U.S.C. § 5362(1)(A).

could have specifically identified internet poker as an activity covered by the law, but chose not to do so.

Along these same lines, there is also a major disparity between the scope of the UIGEA and the scope of the Washington's Gambling Act, as the latter encompasses "card games" regardless of whether chance is a factor.³⁸

This Court need not decide if poker is a game "subject to chance." The mere fact that it is unclear whether poker is covered by the UIGEA defeats the State's argument that the UIGEA provides an express grant of authority to regulate the activity.

d. The Wire Act does not grant Commerce Clause authority to the states and does not cover internet poker.

The State's understanding of the Wire Act is upside down. The Wire Act contains no grant of Commerce Clause authority to the states. Instead, the Wire Act is the clearest example of Congress choosing to regulate *interstate* gambling while leaving regulation of *intrastate* gambling to the states.

³⁸ The Legislature obviously believed that "card games" and "contests of chance" were separate activities; otherwise there would have been no need for separate designations. Accordingly, there is a class of activities clearly covered by Section 240 but clearly excluded from the UIGEA, a prime example being duplicate bridge, which is frequently played for money over the internet.

The State argues that “Congress chose to enhance local regulation of gambling, as opposed to imposing a uniform standard.”³⁹ This argument also stands the truth on its head. The Wire Act absolutely imposes a uniform national standard on *interstate* sports betting. Under the Wire Act, a sports wager transmitted from any one of the fifty states to any other state is a violation of the law. This is true even if the transmission is to or from Nevada, a state that has legal sports betting.⁴⁰

Not only does the Wire Act withhold any grant of Commerce Clause authority to the states, the Wire Act also does not reach internet poker, but instead only reaches wagering on “sporting events and contests.” This issue was decided in *In re MasterCard*, 132 F.Supp.2d 468, 480-81 (E.D. La. 2001), *aff’d*, 313 F. 3d 257 (Fifth Cir. 2002)(“A plain reading of the statute clearly requires that the object of the gambling be a sporting event or contest.”). The title of the enabling legislation, “Sporting Events – Transmission of Bets, Wagers, and Related Information Act,” Pub. L. No. 87-216, § 2, 75 Stat. 491, 552-553 (1961), and the legislative history, “This particular bill involves the transmission of wagers or bets or layoffs on horse racing and other sporting events,” 107 Cong. Rec. 16533 (August 21, 1961) also lead to the same conclusion.

³⁹ BR at 20.

⁴⁰ The Professional and Amateur Sports Protection Act, 18 U.S.C. § 3702, which generally bans sports betting, contains a grandfather clause that protects the Nevada sports betting industry.

Moreover, Congress obviously recognizes that the Wire Act only extends to sports betting. If the Wire Act extended to all forms of gambling, then internet gambling of all types *would already be illegal* in the United States and there would have been no reason whatsoever for Congress to consider a raft of anti-gambling bills between 1997 and 2006.

The State's reliance on *United States v. Lombardo*, 2007 WL 4404641 (D. Utah December 13, 2007) is misplaced for a number of reasons. First, *MasterCard* was decided at a higher level court (Circuit Court of Appeals versus district court). Second, *Lombardo* merely discussed the sufficiency of an indictment, a very low analytical standard. Perhaps most importantly, *Lombardo* reached an absurd result. Under *Lombardo*, it is illegal to transmit a non-sports wager in interstate commerce, but legal to transmit the information that assists in the making of the wager. Congress may sometimes be confused, but not *that* confused.⁴¹

2. REPLY TO SECTION IV.-C OF STATE'S BRIEF

- a. **Washington's law discriminates against out-of-state business interests and is subject to a virtually *per se* rule of invalidity.**

⁴¹ In *New York v. World Interactive Gaming Corp.*, 714 N.Y.S. 2d 844 (N.Y. Sup. Ct. 1999), also cited by the State, the question of whether the Wire Act extends to non-sports wagering was not before the court, so the court's declaration that the defendant had violated the Wire Act was, at best, dicta.

This Court should follow the analytical framework utilized in *State v. Heckel*, 143 Wash.2d 824, 24 P.3d 404 (2001), the one Washington case dealing with a Commerce Clause challenge to an internet regulation. Under *Heckel*, the court performs a two-step analysis. First, the court must determine if the challenged law “openly discriminates against interstate commerce in favor of intrastate economic interests.” Where this discrimination is found, the challenged statute is subject to nearly *per se* invalidity. Where the challenged law does not discriminate, the court moves on to the *Pike* balancing test.⁴²

Washington’s law openly discriminates against out-of-state business interests, although its text does not spell out this discriminatory intent. Instead, Washington achieves its discriminatory goals by way of the fact that the protected business interests, primarily brick-and-mortar casinos and cardrooms, do not have a presence on the internet. On this point, the Appellant is accused of comparing apples and oranges. The accusation is well taken.

Assume that businesses in Washington State produce apple juice. Assume further that all orange juice consumed in this state is imported from other states or countries. Assume still further that apple juice and

⁴² Rather inexplicably, the State fails to properly articulate these steps and, instead, describes discrimination analysis as part of the *Pike* balancing test. BR at 22. It is not.

orange juice are competitive products.⁴³ Finally, assume that Washington bans the sale of orange juice, *regardless of the place of origin*.

By the logic put forward by the State in this case, such a ban would survive Commerce Clause scrutiny because it would apply equally to both in-state and out-of-state producers of orange juice, and would therefore be “evenhanded.” However, both the State and this Court must know that such a law would be stricken down *tout de suite*. How is the internet poker ban any different? It protects in-state business from interstate and international competition or, in other words, engages in exactly the same conduct that the Commerce Clause forbids.⁴⁴

The State’s “evenhandedness” argument has been rejected in a number of Commerce Clause cases. For example, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Supreme Court of the United States struck down a city ordinance requiring local inspection of milk

⁴³ Based on its arguments in this case, the State would presumably dispute this assumption. One also supposes the State would also argue that frozen orange juice does not compete with fresh squeezed.

⁴⁴ The State claims that discrimination must be shown with respect to “similarly situated” economic interests, but provides no authority for this assertion. Without authority, this assertion is merely a self-serving fabrication. Indeed, it is hard to imagine how the interests could be similarly situated, as the protected interests are in-state and the disadvantaged interests are out-of-state. Likewise, the State’s assertion that the economic interests of brick-and-mortar casinos are “fundamentally different” than those of internet casinos is without foundation. The question for Commerce Clause purposes is the business interests *compete*.

products, even though the ordinance applied “evenhandedly” to milk produced both within and without the state of Wisconsin.⁴⁵

Washington has a massive gambling industry, which includes both internet gambling (horseracing)⁴⁶ and brick-and-mortar poker. Internet poker is economic competition for these interests, and Washington State has acted to restrain that competition, which is the very definition of “discrimination.”

b. Washington’s statute fails the *Pike* balancing test.

In this section of its brief, the State devotes a lot of energy and a lot of ink to demonizing a product that it actively markets to its citizens. And, of course, the State reiterates its transparently bogus claim that it once “completely outlawed” gambling. The truth is that the citizens like gambling and the State *loves* it.

Analytically, the State’s approach bears more than a passing resemblance to the futile arguments made by Michigan and New York in *Granholm v. Heald*, 125 S.Ct. 1885 (2005). In *Granholm*, the defendant states attempted to defend alcohol distribution schemes that effectively barred market access for small out-of-state producers, particularly those

⁴⁵ *Dean Milk*, 340 U.S. at 354 (“In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.”)

⁴⁶ The fact that horserace betting is not “gambling” under Washington law (but is gambling under federal law) is irrelevant to the question of whether horseracing is improperly protected from competitions.

who wished to sell their products in Michigan and New York over the internet.⁴⁷ The states argued that their regulations were necessary to protect “public health and safety” (sound familiar?) and that internet wine sales posed a special danger to minors.⁴⁸ The Supreme Court rejected this argument as “speculation” and instead demanded that the states provide “concrete evidence” to support their claims.⁴⁹

Of course, with respect to the alleged dangers of internet gambling, *the State offers nothing but speculation*. For example, the State suggests that “safeguards” cannot be “effectively enforced” with respect to internet gambling. This statement ignores the fact countries as diverse as England, Spain, South Korea, Australia and Brazil have concluded otherwise, *i.e.*, that internet gambling is no more difficult to regulate than any other business. Furthermore, using Pokerstars as an example, the State simply assumes that the Isle of Man Gambling Supervision Commission is less effective or less competent than the Washington State Gambling Commission.⁵⁰

The State’s citation to Bruce Keller is both absurd and ironic. Keller’s hysterical hyperventilations were published nearly a decade ago, yet none of the horrors predicted therein have come to pass. If they have

⁴⁷ *Granholm*, 125 S.Ct. at 1882-85.

⁴⁸ *Id.* at 1905-6.

⁴⁹ *Id.* at 1907.

⁵⁰ <http://www.gov.im/gambling/benefits/aboutgcc.xml>

come to pass, where is the “concrete evidence” the Supreme Court demands? The irony of citing Keller arises from the fact that he wrote the article to advocate federal regulation of internet gambling because state regulation might run afoul of the Commerce Clause.⁵¹

The State then turns its attention to international terrorism and money laundering. While these are clearly bad things, they obviously fall far outside the “local public interest” that the State is supposedly protecting.

i. RCW 9.46.240 has not been “endorsed” by Congress.

As it moves through its purported *Pike* analysis, the State reiterates arguments made elsewhere in its brief. Notably, the State cites *Winshare Club*, 542 So. 2d , which stands for the proposition that states may regulate “purely in-state lottery sales as they see fit.” The State then recklessly twists the holding of *Winshare* to suggest that it applies to a) all gambling and b) interstate gambling. This blatant disregard of authority appears all too frequently in the State’s brief.

ii. The State’s rebuttal of *Cabazon Band* misses the point: where a state legalizes gambling, it no longer regulates it on a moral basis.

⁵¹ KELLER, 108 Yale L.J., at 1593-6, “The advantage of the federal approach described earlier is...dormant Commerce Clause problems and state policy disputes are avoided.” Keller also believes gambling laws should mirror the Wire Act and exclusively target “those in the business.” *Id.*

Cabazon Band is not cited to suggest that it is dispositive of this case on the merits. The case does, however, stand for the proposition that where a state legalizes gambling, the state can no longer claim that it regulates gambling for the purpose of regulating morality. Instead, under these circumstances, the State must concede that it is merely regulating commerce. There is no rational reason to accept the State's argument that gambling has a moral dimension when dealing with, say, England, but does not have a moral dimension when dealing with the Muckleshoot Tribe. Further, from the State's point of view, both relationships are covered by the Commerce Clause, which further negates the State's argument.

iii. The *Pataki/Heckel* analytical framework compels a finding that the challenged law is unconstitutional.

American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (1997), represents the first dormant Commerce Clause challenge to state regulation of the internet. It set forth a rule, still unrefuted, that state laws impairing traffic on the internet face a severe constitutional hurdle. If *Pataki* is somehow unclear on this point, *Granholm* certainly provides an emphatic confirmation that the states cannot regulate the internet to protect in-state business interests from out-of-state competition.

Since *Pataki* was adopted, the states have successfully carved out a few narrow exceptions, including the exception created in *Heckel*.

In its *Heckel* analysis, the State repeats its unfounded assertion that Congress has granted the states authority to regulate all internet gambling. Not true. The State then notes that the *Heckel* Court distinguished *Pataki* on the grounds that the statute struck down in *Pataki* could have had the inadvertent effect of criminalizing activity occurring outside the state of New York. This distinction is irrelevant for three reasons. First, unlike the anti-spam law upheld in *Heckel*, Section 240 does not contain any geographical restriction. On its face it could make a felon of a poker player whose only crime was to play against a Washington resident. Second, the cited section of *Pataki* articulated just one of the many reasons the challenged statute was struck down. Third, the distinction with *Pataki* did not provide the basis for the *Heckel* decision and should be viewed as dicta. The *ratio decidis* for *Heckel* was the fact that it did not discriminate (did not favor in-state spammers over out-of-state spammers) and, more importantly, the Court determined that the “truthful subject line” requirement actually *improved* the flow of interstate commerce, a finding that made the result of the case a foregone conclusion.

The more relevant question is not whether *Heckel* can be distinguished from *Pataki*, but whether *Heckel* can be distinguished from the present case. It can, but in a way that leads to an opposite result.

The most obvious distinction is that the law challenged here discriminates against out-of-state business interests while the law challenged in *Heckel* did not. The State's explanation for why it adopted the law is absurd and, more importantly, beside the point, as the question is whether the law has the "practical effect" of discriminating.⁵²

The absurdity of the State's position is obvious from the Senate Bill Report for SSB 6613.⁵³ There is no rational basis for believing that a lawsuit over electronic scratch lottery tickets would compel the State to ban all forms of internet gambling. Moreover, the State practically admits to a Commerce Clause violation when it says that "Clearly prohibiting any form of Internet Gambling is needed to support the state's policy in this regard against *lawsuits and challenges brought under various international trade agreements*." Exactly when did Washington become a party to international trade agreements or lawsuits arising from same?

iv. **The challenged statute fails the "least restrictive means test."**

⁵² *Dean Milk*,

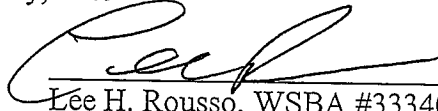
⁵³ CP 368-369.

Even where a state can justify placing some burden on interstate commerce, the state must show that it has adopted the least restrictive means of achieving its legitimate ends. Washington fails dismally in this regard, as the challenged law represents massive overkill.

The State's argument that it has adopted the least restrictive means is completely belied by the fact that the State increased the penalties under Section 240 from a gross misdemeanor to a Class C Felony. Obviously the former penalty, which served the State well for 33 years, is less restrictive than the current penalty. Ranking the crime as a misdemeanor or civil infraction would be less restrictive.⁵⁴ The State could go even a step further and completely remove the player from the coverage of the statute, which would bring the State in line with federal statutes.

By treating internet gambling so severely, Washington stands shoulder-to-shoulder with such enlightened regimes as Iran, Myanmar and North Korea. This is not a very proud legacy for a state named after America's first president, a man who financed the First Continental Army *by way of a lottery!!*

Submitted this the 5th day of January, 2009


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Appellant *pro se*

⁵⁴ Jaywalking is far more dangerous to one's health than playing internet poker, but the State obviously does not find it necessary to make jaywalking a felony.

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NO. 60759-6
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEE H. ROUSSO, Appellant,

v.

STATE OF WASHINGTON,
Respondent.

CERTIFICATE OF SERVICE

Alecia J. Rivas states as follows:

I am over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness therein.

I certify that on the 5th day of January, 2009, I caused a true and correct copy of the following documents:

Appellant's Reply to Respondent's Brief

To be served on the following in the manner indicated below:

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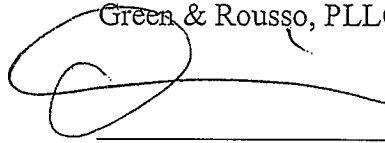
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Dated: 5th January 2009, at Renton, King County, Washington.

Green & Rousso, PLLC

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Alecia J. Rivas
Legal Assistant